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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/769,158	01/29/2004	Richard C. Smith	M-15596 US	7774

32605 7590 09/06/2007
MACPHERSON KWOK CHEN & HEID LLP
2033 GATEWAY PLACE
SUITE 400
SAN JOSE, CA 95110

EXAMINER

DABNEY, PHYLESHA LARVINIA

ART UNIT	PAPER NUMBER
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2614

MAIL DATE	DELIVERY MODE
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09/06/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/769,158

Applicant(s)

SMITH ET AL.

Examiner

Phylesha L. Dabney

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 June 2007.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9, 15-18, 25-29, 32, 33 and 36-38 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 25-29, 32, 33 and 36 is/are allowed.
- 6) ☒ Claim(s) 1-9, 15-18, 37 and 38 is/are rejected.
- 7) ☒ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 1/29/04 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application
- ☐ Other: _____

DETAILED ACTION

The action is in response to the Amendment received on 29 June 2007 in which claims 1-9, 15-18, 25-29, 32-33, and 36 are pending. Claims 10-14, 19-24, 30-31, and 34-35 were cancelled. Applicant's request for reconsideration of the finality of the rejection of the last Office action is persuasive and, therefore, the finality of that action is withdrawn.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-9 and 37-38 are rejected under 35 U.S.C. 102(e) as being anticipated by Bayer (U.S. Patent No. 2005/0111686).

Regarding claims 1-9, Bayer teaches a device for facilitating hearing, the device (figs. 12-15) comprising: an earpiece (320) configured to be captured at least partially within the conchae of an ear, the earpiece comprising at least one generally arcuate rib ((332, 364) and at least one generally vertical rib (334, 340) the generally vertical rib extending between points proximate ends of the arcuate rib; an acoustic conduit (fig. 15) configured so as to cause sound to pass through the earpiece; and wherein the earpiece is configured for use in either ear by re-orienting the earpiece without re-configuring the earpiece (paragraphs 0055-0059).

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Regarding claim 37, Bayer teaches a device for facilitating hearing, the device (figs. 12-15) comprising: an earpiece (320) configured to be captured at least partially within the conchae of an ear, the earpiece comprising two ribs (332, 364; form arcuate portion with 2 detents/ribs) that are generally configured to define a D; an acoustic conduit (fig. 15) configured so as to cause sound to pass through the earpiece; and wherein the earpiece is configured for use in either ear by re-orienting the earpiece without re-configuring the earpiece (paragraph 0055-0059).

Regarding claim 38, Bayer teaches a device for facilitating hearing, the device (figs. 12-15) comprising: an earpiece (320) configured to be captured at least partially within the conchae of an ear, the earpiece comprising a boss (fig. 15) having a bore formed therethrough, the boss (fig. 15) being configured to extend at least partially into the ear canal; an acoustic conduit (fig. 15) configured so as to cause sound to pass through the earpiece; and wherein the earpiece is configured for use in either ear by re-orienting the earpiece without re-configuring the earpiece (paragraph 0055-0059).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims **15-18** are rejected under 35 U.S.C. 103(a) as being unpatentable over Bayer (U.S. Patent No. 2002/0172386).

Regarding claims 15-17, Bayer does not teach the device as recited in claim 1, wherein the earpiece (10) is formed of any particular type of material including a resilient polymer having a Shore A durometer of between approximately 35 and approximately 45.

However, it is known to fabricate the earpiece of resilient materials such as rubber, silicone, vinyl, etc., that can have a durometer hardness in the range between 35 and 45 for providing softness and comfort to the user.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to fabricate the earpiece of resilient materials such as rubber, silicone, vinyl, etc., in the invention of Bayer for the reasons stated above.

Regarding claim 18, Bayer does not teach the device as recited in claim 1, wherein the earpiece (10) is formed of any particular type of material including injection molding.

However, it is known to fabricate the earpiece of injection molded material for providing softness and comfort to the user.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to fabricate the earpiece of injection molded material in the invention of Bayer for the reasons stated above.

Response to Arguments

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Furthermore, the applicant did not traverse the examiner's assertion of official notice with respect to claims **15-18, 25-27, and 32-33** as noted in previous office action (dated 3 May 2006); therefore, the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant failed to traverse the examiner's assertion of official notice (MPEP 2144.03).

Allowable Subject Matter

Claims 25-29, 32-33 and 36 are allowed. With respect to the claims, the prior art of record fails to teach an earpiece comprising a generally arcuate rib and a generally vertical rib formed so as to generally define the letter D, and also comprises a boss having a bore formed there through, the boss being formed to the generally vertical rib; and wherein the earpiece is sufficiently symmetrical to be configured for use in either the right or left ear, as substantially described and connected with the other functional language of these claims

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Phylesha L. Dabney whose telephone number is 571-272-7494. The examiner can normally be reached on Mondays, Wednesdays, Fridays 8:30-4 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Curtis Kuntz can be reached on 571-272-7499. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Any response to this action should be mailed to:
Commissioner of Patents and Trademarks
P O Box 1450

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Alexandria, VA 22313-1450

Or faxed to:

(703) 273-8300, for formal communications intended for entry and for informal or draft communications, please label "Proposed" or "Draft" when submitting an informal amendment.


Hand-delivered responses should be brought to:

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Randolph Building
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April 19, 2007

PLD


MELUR RAMAKRISHNAIAH
PRIMARY EXAMINER